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THE PROGRESS OF THE LAW, 1919–1922

EVIDENCE. II

PRELIMINARY TOPICS (*Continued*)

ADMISSIONS. A valuable contribution to the theory of admissions by Edmund M. Morgan [56] treats them as affirmative evidence against the admitter of the truth of the facts stated, which escape the operation of the hearsay rule only because there is an exception to that rule for all admissions. He attacks Wigmore's view,[57] that admissions are not hearsay because they are not affirmative proof, but operate only destructively to shake the admitting party's case just as the prior inconsistent statements of a witness come in only to shake the witness's testimony. As often in the law, while it is important for purposes of analysis to ascertain the correct explanation of a common legal phenomenon, it makes no practical difference in most situations which view be adopted. Here legal research enters upon the fascinating process of finding or devising situations where it will make a difference.[58] Ordinarily, whether the admission is a minus quantity on the admitter's side of the case, as Wigmore contends, or a plus quantity on the opponent's side, as Morgan contends, it is allowed in evidence and its effect on the admitter's chances of victory is equally damaging. Morgan, however, cites a case[59] where a verdict against the admitter resting on no evidence but the admission, was sustained, a result incorrect on Wigmore's theory, because then there would have been no evidence at all to support the verdict; and two criminal cases [60] where a statute required the prosecutrix's testimony to be corroborated and the defendant's admission was held corroboration, although on Wigmore's theory it would not be evidence on behalf of the

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[56] "Admissions as an Exception to the Hearsay Rule," 30 YALE L. J. 355 (1921).

[57] 2 EVIDENCE, §§ 1048, 1049; *accord*, "Can an Admission by Silence while under Arrest be Used as Supporting Evidence?" 34 HARV. L. REV. 205 (1920).

[58] For the use of a similar method in the law of negotiable instruments, see Z. Chafee, Jr., "Acceleration Provisions in Time Paper," 32 HARV. L. REV. 747.

[59] M'Kewen *v.* Cotching, 27 L. J. Exch. (N. S.) 41 (1857).

[60] State *v.* Jonas, 48 Wash. 133, 92 Pac. 899 (1907); People *v.* Cascia, 191 App. Div. 376, 181 N. Y. Supp. 855 (1920), disapproved by 34 HARV. L. REV. 205, 210.

state. Unfortunately none of these three cases discusses the point in controversy. Morgan also cites many judicial statements in support of his position. He shows that the affirmative use of admissions which are against interest when made cannot be explained by the recognized hearsay exception of declarations against interest, because (a) the declarant is usually available, (b) admissions are not limited to pecuniary or proprietary interest. It may be added that declarations against interest may be introduced by either party, whereas admissions are good only against the declarant. On the other hand, this one-sided aspect makes admissions so different from all the recognized hearsay exceptions, that it is questionable whether they have any place there. Morgan argues forcibly that admissions are free from the main objections to hearsay testimony. There is abundant opportunity to test the accuracy of the report of what the declarant said and the truth of what he did say, because he himself is usually in the case and directly interested to weaken the effect of the admission.

The silence of an arrested person in the presence of those who make grave charges against him may be interpreted as an admission of the charges or as insistence upon his constitutional privilege against self-incrimination. Perhaps if he makes no express claim of privilege, the former interpretation is permissible,[61] but this is clearly wrong when he said, "Our counsel gave us orders not to talk about the case until we were taken into court." [62] In a civil suit against the driver of an automobile, the damaging remark of a bystander after the accident to which the defendant made no reply was admitted against him.[63] However, an unanswered letter is not usually an admission against the recipient, because the probability of a denial is much less than in the case of damaging oral statements.[64]

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[61] People *v.* Cascia, *supra*, one judge dissenting on this point; People *v.* Wilson, 298 Ill. 257, 131 N. E. 609, (1921); State *v.* Claymonst, 114 Atl. (N. J.) 155 (1921).

[62] Yet the silence was held an admission in People *v.* Graney, 32 Cal. App. 1098, 192 Pac. 460 (1920), noted in 30 YALE L. J. 300, 9 CAL. L. REV. 66, 69 U. PA. L. REV. 280.

[63] Baldarachi *v.* Leach, 30 Cal. App. 742, 186 Pac. 1060 (1919), noted in 18 MICH. L. REV. 705; *accord*, Ollert *v.* Ziebell, 114 Atl. 356 (N. J. Eq., 1921).

[64] Thomas *v.* Jones, [1921] 1 K. B. 22 (C. A.); see also, "Admissibility in favor of writer of unanswered letter not part of mutual correspondence," 8 A. L. R. 1163, note.

Vicarious admissions mainly involve the effect of the substantive law upon the existence of the requisite privity or authority to make the statement.[65] When a railway requires a conductor to report accidents to the company, it leaves the details of the report to his independent observation and opinions, often based on hearsay, and does not adopt him as the mouthpiece of the company for this job, as he is when he tells passengers to alight. Consequently, such a report is not properly an admission by the company.[66] Statements of the defendants' counsel outside of court that his client will probably be convicted are not admissible on behalf of the state, because this is not the kind of talking for which the attorney was hired.[67]

Are an agent's admissions by conduct excluded unless the conduct is within the scope of the employment? In *Molino* v. *New York*,[68] the driver of an automobile truck jumped from it after striking a boy, and started to run away. This was held inadmissible evidence against the employer to prove the driver's negligence, because it was not "a part of the res gestæ," any more than the arrest of the driver or his declaration after the accident. The court has confused widely separated problems under one ambiguous Latin phrase. The fundamental principle is, all relevant evidence is admitted unless excluded by some definite rule. If the driver's conduct is relevant to prove his negligence, what rule excludes it? (a) His declarations that he was negligent would be hearsay, and excluded unless they fell within some hearsay exception, *e. g.*, the so-called "res gestæ" exception or Morgan's exception for admissions; but conduct is not hearsay and all talk of hearsay exceptions drops out. Flight may have the same logical force as the words, "I am negligent," but it is not subject to the same legal objections, because it is not a communication of thought, but an independent act, admissible like any other fact if it is probative. The distinction is not between words and action, because wigwagging or deaf-and-dumb signs might also be hearsay; but between

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[65] Use of admissions by holder of life insurance policy after issue against beneficiary, 4 MINN. L. REV. 359; 5 *ibid.*, 316.

[66] Bell *v.* Milwaukee Electric R. & L. Co., 169 Wis. 408, 172 N. W. 791 (1919), noted in 33 HARV. L. REV. 113.

[67] State *v.* Edins, 187 Pac. 545 (N. M., 1920), noted in 8 A. L. R. 1334.

[68] 186 N. Y. Supp. 742 (1921), criticized adversely in 30 YALE L. J. 866.

action for its own sake, and action to communicate thought. The latter must ordinarily be tested by cross-examination. (b) His arrest is excluded by the Opinion Rule because it expresses the opinion of persons who may not have observed the facts and were affected by hearsay. The driver's flight expresses an opinion of negligence by the person most directly involved in the events. Therefore, the flight should have been admitted unless its logical effect was too slight. It would have been sufficiently probative, if the driver himself had been sued, and so should come in. The question whether the admission is within the scope of authority does not affect its tendency to prove the driver's negligence, though it does determine its admissibility if it is subject to the Hearsay Rule..

Law and fact. While questions of fact involved in the issue are usually for the jury, some are for the judge because of historical reasons, but the tendency for these to gravitate into the hands of the jury is exemplified by a New York case of probable cause in malicious prosecution,[69] and an Oklahoma statute making contributory negligence and assumption of risk in all cases a question of fact for the jury.[70] When a question arises whether certain facts fall within a statute, this may be a problem of statutory construction for the court, to ascertain whether the legislative language means enough to cover the facts; or a problem of inferences of facts for the jury or other fact-tribunal, to ascertain whether the facts should be understood to satisfy a given statutory meaning. Thus the question of whether a certain beverage is "intoxicating" [71] or whether the advocacy of the general strike is "advocacy of force and violence" [72] is extremely hard to classify.

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[69] Grew *v.* Mountain Home Telephone Co., 192 App. Div. 863, 183 N. Y. Supp. 840 (1920), noted in 20 COLUMBIA L. REV. 897.

[70] Held valid in Chicago, etc. Ry. Co. *v.* Cole, 251 U. S. 54 (1919), noted in 90 CENT. L. J. 167.

[71] Held fact for the jury, Commonwealth *v.* Sookey, 128 N. E. 788 (Mass., 1920), noted in 19 MICH. L. REV. 566; held fact for administrative ruling, Hoffman, etc. Co. *v.* McElligott, 259 Fed. 525 (C. C. A., 2d Circ., 1919), reversing 259 Fed. 321 (1919), noted in 19 COLUMBIA L. REV. 506, 18 MICH. L. REV. 159.

[72] Held fact for final determination by an administrative official, United States *ex rel.* Abern *v.* Wallis, 268 Fed. 413 (S. D. N. Y., 1920); held law, for judicial review, Colyer *v.* Skeffington, 265 Fed. 17 (D. C. Mass., 1920), reversed, Jan. 11, 1922; see 12 A. L. R. 197, 30 YALE L. J. 625. *Cf.* People *v.* Gitlow, 187 N. Y. Supp. 783 (App. Div., 1921), noted in 30 YALE L. J. 861.

Where the evidence in a civil case is insufficient to support a verdict for one side, the court can direct a verdict for the opponent. In a recent equity case [73] the chancellor rejected the uncontradicted testimony of the complainant because he disbelieved him. This was held erroneous, and *a fortiori* a direction of a verdict for such a reason would be reversed. But it was said that if a witness's testimony was contradictory to the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him. Under such circumstances a directed verdict would also be proper.

Criminal cases are different. Although the undisputed facts show that the defendant is guilty, and thus there is no evidence to support an acquittal, the court has no power to direct a verdict. The jury has an inalienable right to go wrong. In *Horning* v. *District of Columbia*,[74] a minority of four justices of the Supreme Court regarded this right as violated by a trial judge, who charged,

"'a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. . . . Of course, gentlemen of the jury, I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that.'"

Justice Brandeis read the dissenting opinion. Justice Holmes delivered the opinion of the court, and sustained the conviction, because in such a case "the function of the jury if they do their duty is little more than formal," and they still had the power, or "the technical right if it can be called so, to decide against the law and the facts"; "if the defendant suffered any wrong it was purely formal." Justice Brandeis replied that "whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the federal Constitution, a mere formality." A recent decision in the English Court of Criminal Appeal seems to agree

[73] Kelly *v.* Jones, 290 Ill. 375, 125 N. E. 334 (1919), noted in 14 ILL. L. REV. 664. See also W. L. David, "The Scintilla Rule of Evidence," 55 AM. L. REV. 122 (1921).

[74] 254 U. S. 135, 140 (1920), noted with varying views in 34 HARV. L. REV. 443, 21 COLUMBIA L. REV. 191, 30 YALE L. J. 421, 5 MINN. L. REV. 231. A verdict was directed for the plaintiff in a civil action in Agricultural Insurance Co. *v.* Higginbotham, 274 Fed. 316 (1921), noted in 20 MICH. L. REV. 240.

with Justice Brandeis.[75] The trial judge in the *Horning* case undoubtedly attained substantial justice, and perhaps the jury should lose its power to render general verdicts in criminal cases, but even undesirable laws ought to be faithfully observed so long as they exist.

Remote and Prejudicial Evidence [76]

If it were possible for the judicial mind to operate in a purely mathematical fashion, we might lay down the formula: that the admissibility of evidence varies directly with its probative force and the absence of better evidence on the point, and inversely with its prejudicial effect and tendency to occupy time. At all events this expresses the principle of balancing considerations which is applied to doubtful evidence, though in a less exactly quantitative manner. Thus, in a criminal prosecution if the defendant is shown to have committed other crimes than that specified in the indict-

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[75] Rex *v.* Hendrick, [1921] W. N. 87 (C. C. A.), noted in "Whist Drives," 151 L. T. 159.

[76] The following recent material, not discussed in the text, bears on this heading: Bloodhounds, 33 HARV. L. REV. 864, 54 AM. L. REV. 109, 26 W. VA. L. Q. 91, 5 MINN. L. REV. 228. Skull of victim of homicide, 31 YALE L. J. 107. Value evidence, "What is Admissible Evidence of Value in Eminent Domain?" Nathan Matthews, 35 HARV. L. REV. 76 (1921); 20 COLUMBIA L. REV. 845. "Proof of other defamatory statements in civil action for libel or slander," 12 A. L. R. 1026, note. Habitual intoxication, So. Traction Co. *v.* Kirksey, 110 Tex. 190, 222 S. W. 702 (1919), noted in 30 YALE L. J. 195, 91 CENT. L. J. 280, 9 A. L. R. 1405, note. Habitual carefulness, Wallis *v.* Southern Pacific R. R. Co., 61 Cal. Dec. 82, 195 Pac. 408 (1921), noted in 9 CAL. L. REV. 242. Absence of previous accidents, Kansier *v.* Billings, 56 Mont. 250, 184 Pac. 630 (1919), noted in 68 U. PA. L. REV. 293. Occurrence of similar accidents, Charles *v.* Mayor, etc. of Baltimore, 114 Atl. 565 (Md., 1921), noted in 31 YALE L. J. 330. Violation of rules to prove negligence, Louisville & N. R. Co. *v.* Stidham's Admx., 187 Ky. 139, 218 S. W. 460 (Ky., 1920), noted in 34 HARV. L. REV. 213. Non-consent to killing of animal, State *v.* Parry, 194 Pac. (N. M.) 864 (1920), noted in 19 MICH. L. REV. 150. Uncommunicated threats in homicide, Mott *v.* State, 123 Miss. 729, 86 So. 514 (1920), noted in 34 HARV. L. REV. 675. Peaceable character of decedent to rebut self-defense, DeWoody *v.* State, 21 Ariz. 613, 193 Pac. 299 (1920), noted in 5 MINN. L. REV. 230. Corroboration, Thomas *v.* Jones, [1921] 1 K. B. 22 (C. A.), noted in 34 HARV. L. REV. 667, 69 U. PA. L. REV. 180; People *v.* Whitson, 185 N. Y. Supp. 590 (1921), noted in 21 COLUMBIA L. REV. 382; Freed *v.* United States, 266 Fed. 1012 (1920), noted in 34 HARV. L. REV. 443; Leon *v.* State, 21 Ariz. 418, 189 Pac. 433 (1920), noted in 5 MINN. L. REV. 76; 9 A. L. R. 1397, note. Evidence of ante-nuptial immoral character of defendant's wife, whose intimacy with the victim of homicide is set up in mitigation, State *v.* Bereal, 225 S. W. 252 (Tex. Cr. App., 1920).

ment, he has a propensity to commit crimes, which makes his guilt of this particular offense more probable, especially if his other offenses are of the same general nature. This logical effect is, however, slight, and is outweighed by the objections, (a) that the tribunal has enough on its hands in trying one crime and cannot distract itself by the investigation of several others; (b) the jury would be inclined to convict the defendant even though they doubted his guilt of the offense for which he was on trial, because they thought him a bad man who had better be locked up anyway. Consequently, such evidence is always inadmissible, if it shows only a criminal nature.[77] On the other hand, the proof of other crimes may have an independent logical effect in establishing some essential element of this specific crime. For instance, if a pawnbroker indicted for receiving a stolen watch says he did not know it was stolen, the fact that he has repeatedly been found with stolen jewelry in his possession makes it improbable that he remained in continuous ignorance of the nature of his clients. It is sometimes said that if a fact is independently probative and admissible if not a crime, its criminal quality is immaterial and does not exclude it. Possibly this goes too far. The criminality is a prejudicial factor to be weighed in the balance against admission, and might well keep out somewhat remote evidence which would otherwise just squeeze in, but this factor is frequently outweighed by the strong logical force of the other crimes to prove intent, guilty knowledge, motive, or some other element of the crime under trial.[78] The principle is clear, but those who established it have, like Captain Jack Bunsby, left its application to others, and there the trouble begins.

The difficulty of application is well brought out by two cases of army contract frauds in the United States Circuit Court of Appeals for the First Circuit. In *Sears* v. *United States*,[79] the defendants were indicted for conspiracy in furnishing outer and inner soles

[77] Recent examples are, State *v.* Fisher, 114 Atl. 247 (N. J., 1921); Payne *v.* State, 232 S. W. 802 (Tex. Cr. App., 1921); Steele *v.* Commonwealth, 232 S. W. 646 (Ky., 1921).

[78] Recent examples are: State *v.* Israel, 114 Atl. 314 (N. J., 1921); Gerber *v.* State, 232 S. W. 334 (Tex. Cr. App., 1921); State *v.* Carroll, 232 S. W. 699 (Mo., 1921); State *v.* Rathie, 199 Pac. 169 (Ore., 1921); McClelland *v.* State, 114 Atl. 584 (Md., 1921), disapproved by 20 MICH. L. REV. 235.

[79] 264 Fed. 257 (C. C. A., 1st Circ., 1920). Both cases are approved in 69 U. PA. L. REV. 180.

of shoes below specifications, and bribing inspectors to pass them. Evidence that inferior middle soles were simultaneously supplied on the same contract was held admissible to rebut the possibility of honest mistake. In *Macdonald* v. *United States*,[80] the general manager of a shoe factory was indicted with others for conspiracy in using counterfeits of certain inspectors' stamps on shoes. The manager's defense was that he did not know his associates were using these counterfeit stamps. The government proved that another inspector, the manager's chief corroborative witness, had been placed by him on the company's pay roll while inspecting another contract in the factory. The majority of the court held that this testimony should have been excluded, because the manager's misconduct on one contract did not tend to show his knowledge of an entirely different kind of fraud on a different contract. Judge Anderson, who had delivered the opinion in the *Sears* case, filed an exhaustive dissenting opinion in the *Macdonald* case, declaring that the manager's contemporaneous bribing of one inspector had a direct tendency to prove his guilty knowledge of the use of the counterfeit stamps of unbribed inspectors. Further, since the bribed inspector was the manager's chief witness, the guilty relations between them were just as material for purposes of impeachment as the marital relationship of a witness to the defendant. There was no unfair surprise, for the defendant came to court fully prepared to meet all the government's contentions as to his relations with his chief corroborating witness.

"The evidence was competent as tending to show a purpose and design then and there by Macdonald to defraud the government by causing either by dishonest or by counterfeit inspection rejected or uninspected leather to be put into shoes as good and approved leather. . . . It did not 'tend to show that Macdonald had an evil disposition' etc., as the majority argue; but it did tend to show that he was then and there intending to cheat the government by getting around its inspection system. . . . The two projects were cognate. They were not, fairly viewed, independent crimes. . . . Singularly enough, this decision — reverting to the most technical rules of the most scholastic period in the administration of our law — is made just after Congress

[80] 264 Fed. 733 (C. C. A., 1st Circ., 1920), Anderson, J., *diss.* The case also involves an interesting point whether inadmissibility is cured by the introduction of rebutting evidence.

has, after a long agitation for reform, enacted a statute intended to prevent such reversals on merely technical grounds." [81]

An unusual reason for the admission of other crimes was presented by the facts of an English case.[82] A husband testified that he called upon the defendant to arrange an illegal operation for his wife, on the recommendation of another married woman. The defendant, who was on trial for causing the wife's death, denied the operation and advanced the innocent explanation that the husband came to his house to look for apartments. The prosecution was allowed to corroborate the husband's evidence by the testimony of the other woman, that she had made the recommendation and that the defendant had previously performed a similar operation upon her. It is obvious that while criminality does not exclude the relevant testimony in such a case, on the other hand it is not the ground of its admission. The woman's corroboration would have been probative even if it had not involved an additional crime on the defendant's part, and the counterbalancing prejudicial element would have been lacking. Consequently, in a New Mexico abortion case,[83] where the defense was the necessity of the operation to save the mother's life, the court seems to have gone too far in excluding the evidence that the defendant had performed another abortion on the same unmarried woman a few months later, on the ground that the state did not prove that the second child was quick, an essential element of the crime in that jurisdiction. The evidence seems relevant. When the defendant alleged that two such operations were necessary to save life, his defense became increasingly improbable, especially as the nature of his practice was made clearer. That the second act was possibly not criminal does not weaken its logical effect, unless we adopt the argument of the court that the mental attitude involved in the subsequent conceivably legal act was so entirely different from the intention to kill a child unnecessarily after independent life develops, that the evidence has no force to render the crime probable. Opposed

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[81] 264 Fed. 733, 752, 753, 756 (1920). The statute referred to is discussed at the close of the last installment of this article.

[82] Rex *v.* Lovegrove, [1920] 3 K. B. 643 (C. C. A.).

[83] State *v.* Bassett, 194 Pac. 867 (N. M., 1921), adversely criticized by 69 U. PA. L. REV. 383.

in principle is a Vermont case,[84] rejecting the contention of a bank commissioner who was prosecuted for willful failure to report errors in books for certain years, that his willfulness could not be proved by similar omissions in previous years because these former offenses were now outlawed by the Statute of Limitations.

The use of intent-evidence in disloyalty proceedings has already been mentioned in the first installment of this survey.[85]

Telephone conversations are admissible if a sufficient identification of the speaker is established as a foundation.[86] Four different situations are presented by some recent cases.

(a) In an English criminal trial [87] Justice Darling admitted the evidence, if the witness recognized the speaker's voice over the wire, after this colloquy with the defendant's counsel:

"*Beresford:* Someone may personate someone else, and it would be extremely difficult to subsequently deal with an interview of that sort.

"DARLING, J. — Of course when the first crime was committed there were no telephones. Has it ever been laid down that as science improves and wrong-doers make use of scientific means, you may not make use of any of the modern discoveries far more recent than the first crime?

"*Beresford:* Does it not come rather to this: — If it were a telegram it would be necessary to produce the original telegram and to prove that it is in the handwriting of the prisoner.

"DARLING, J. — Because there is a handwriting. But where there is no handwriting you do not prove that. Suppose a person says, 'I was in the dark and I heard the defendant say this to me. I knew his voice' — a very common thing — or suppose a man goes to commit a burglary or murder, 'I know the defendant's voice. I have known him for years. I know his voice. I heard him say, "Money or your life."' Would not that be evidence because the witness could not see the person speaking?

"*Beresford:* I quite agree, my lord; but I put it on the ground that on the telephone the voices of persons one knows very well sound en-

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[84] State *v.* Williams, 111 Atl. 701 (Vt., 1920), noted in 34 HARV. L. REV. 787 (1921). When intent is in issue the defendant should be given as wide a scope of proof as the prosecution, Lindgren *v.* United States., 260 Fed. 772 (C. C. A., 9th Circ., 1919), noted in 18 MICH. L. REV. 427. For intent in civil actions, see McKenney *v.* Davis, 178 N. W. (Ia.) 330 (1920), noted in 6 IA. L. BULL. 123. See also pages 443 to 447, *infra*.

[85] 35 HARV. L. REV. 304 and note 12.

[86] See "Admissibility of Telephone Conversations," 31 Harv. L. Rev. 794.

[87] Rex *v.* Lewis, 84 J. P. Rep. 64 (1920).

tirely different. If, in an ordinary room, you hear the voice of a person you knew you would be able to come and say, 'I know that voice. I have known that person for years,' but when it comes to a voice speaking over the telephone it is a different thing. It is common knowledge, I think, that people's voices do sound different on the telephone.

DARLING, J. — It seems to me that is a matter of degree which the jury may take into consideration. You may cross-examine the witness as to whether he was acquainted with Hickman's voice and whether he could say he knew it on the telephone or not."

(b) A Minnesota [88] decision goes beyond this "voice test." The witness, W, put in a telephone call in the usual manner for X. Somebody answered and said he is X. Although W does not know X's voice, this person's conversation may be related as that of X. It was probably his because of the usual success of the telephone system in securing the desired person, and because of the invisible speaker's statement.

(c) If, however, W was called up by somebody who said he was X, the first proof of identification is lacking, because any person masquerading as X would have found it equally easy to reach W. The conversation is inadmissible without further supporting evidence, such as recognition of voice.[89]

(d) When W merely heard an associate go to the telephone and ask for X, the Hearsay Rule obviously prevents W from testifying as to what X said, since he did not hear it himself.[90]

Experiments are often unsatisfactory evidence, because the experimenters may neglect to be sure that the essential conditions of proof are present. This often happens even in science, as when Pasteur's opponents demonstrated the existence of spontaneous generation to their own satisfaction without sealing the vessels sufficiently to prevent the entrance of bacteria. The risk is much greater in judicial proceedings where there is no scientific training, and the experimenter usually gets the result which he wanted when he started out. However, the experiment may be reported if the court believes that the conditions under which it was conducted resembled those of the event involved in the trial. Recent cases admitted tests to see how many hogs could be loaded into

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[88] Wetmore *v.* Hudson, 183 N. W. 672 (Minn., 1921).

[89] Miller *v.* Kelly, 183 N. W. 717 (Mich., 1921).

[90] Bernstein *v.* State, 183 N. W. 576 (Neb., 1921).

a wagon,[91] and how far smoke discharged from a rifle loaded with a certain kind of cartridge could be seen.[92] However, when a trial judge, anxious to ascertain whether a large truck could have skidded at a certain corner while going at a lawful speed, experimented with his "small" passenger car to see how closely he could keep to the curb while turning, conditions were too dissimilar for him to consider the experiment, apart from the problem of the scope of judicial notice.[93]

Confessions

The use of the "third degree" has been justly penalized in Illinois.[94] The accused was "questioned during the greater part of three days and four nights by the state's attorney, two of his assistants, his private secretary, and several police officers." Although no force or threats or promises were proved, his confession was held inadmissible. The court rested on the unsatisfactory ground, that a promise should be implied because the accused must have understood that if he made statements satisfactory to the state's attorney he would receive immunity from prosecution. It seems more probable that he confessed in order to get some sleep. A better reason is, that even if no threat or promise can be construed, nevertheless there was a violation of the privilege against self-incrimination, for he was undoubtedly compelled by the unbroken strain to give evidence against himself. In Louisiana a constitutional amendment has been proposed:[95] "No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime." While exclusion of evidence secured by the "third degree" is a slight protection against its use, a good additional sanction for the constitutional right violated in the Illinois case would have been the disbarment of the state's attorneys and the discharge of the policemen. Although greater severity toward this practice is needed, signs of

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[91] Kohlhagen *v.* Cardwell, 93 Ore. 610, 184 Pac. 261 (1919), exhaustively annotated in 8 A. L. R. 11. For a valuable essay on the general topic, see Irving Browne, "Practical Tests in Evidence," in his Short Studies in Evidence, N. Y., 1847.

[92] State *v.* Holbrook, 98 Ore. 43, 188 Pac. 947 (1920).

[93] Saari *v.* Wells Fargo Express Co., 109 Wash. 415, 186 Pac. 898 (1920).

[94] People *v.* Vinci, 295 Ill. 419, 129 N. E. 193 (1920), noted in 19 Mich. L. Rev. 655.

[95] 12 J. Crim. L. & Crim. 292 (1921).

fewer technical exclusions of confessions are also welcome, *e. g.*, the admission of a confession elicited by advice to tell the truth.[96]

THE HEARSAY RULE [97]

Judgments and pleadings inter alios. The hearsay rule excludes judicial determinations of strong probative value unless they were obtained in a proceeding between the parties to the present trial.[98] A conviction for arson is not admissible in an action for fire insurance, a conviction for adultery in a divorce suit, a conviction for murder in a proceeding to deprive the murderer of the property inherited from his victim, although it is admissible to affect the appointment of an administrator of the victim's estate, since the court then has discretionary powers to consider general unfitness and is not adjudicating rights.[99] Indeed, if the person against whom the conviction is offered was himself the accused, it ought to be admissible under the hearsay rule, since he has had full opportunity to cross-examine the witnesses whose testimony led to the verdict. Of course, such a judgment would not be conclusive evidence; it is not *res adjudicata*. Even if we go further and carve out a new exception for solemn adjudications generally, we should hardly include the verdicts of coroner's juries in that class. Recent

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[96] People *v.* Foster, 211 Mich. 486, 179 N. W. 295 (1920), noted in 30 YALE L. J. 418. See also "Whose promises are contemplated by rule excluding confession made under promise of immunity," 7 A. L. R. 419, note; and "Use of confession improperly obtained, for purpose of impeaching defendant as a witness," 8 A. L. R. 1358, note.

[97] Additional material on hearsay: Declarations made through an interpreter as verbal acts, *In re* Coburn, 207 Mich. 350, 174 N. W. 134 (1919), noted in 29 YALE L. J. 459. Testimony at former trial, illness admits, Blackwell *v.* State, 86 So. 224 (Fla., 1920), approved by 69 U. PA. L. REV. 179. Confrontation waived, Denson *v.* State, 150 Ga. 618, 104 S. E. 780 (1920), approved 19 MICH. L. REV. 439. "Admissibility of dying declaration with respect to transaction prior to homicide," 14 A. L. R. 757, note. Dying declarations in civil cases, H. W. Humble, "Departure from Precedent," 19 MICH. L. REV. 608 (1921). Pedigree, only declarations by the rich relative admitted, Nolan *v.* Barnes, 294 Ill. 25, 128 N. E. 293 (1920), adversely criticized by Wigmore, 15 Ill. L. Rev. 334. "Recital in ancient deed as evidence of facts recited against stranger to title," 6 A. L. R. 1437, note. Examples of situations where the hearsay rule obstructed justice are, Sprague *v.* Sampson, 114 Atl. 305 (Me., 1921); San Francisco Bar Ass'n *v.* Oppenheim, 198 Pac. 1069 (Cal., 1921).

[98] 2 WIGMORE, EVIDENCE, § 1347; 5 *ibid.*, § 1347.

[99] *Re* Crippen, [1911] P. 108.

cases excluding such verdicts in Workmen's Compensation proceedings and actions under Lord Campbell's Act because of the inadequate character of the investigation reach a desirable result.[100] Aside from the hearsay rule, the probative value is small, and the prejudicial effect of the outspoken riders often attached to these verdicts is great. "Crowner's' quest law" may be left to the gravediggers.[101]

The suggested hearsay exception would, however, have admitted evidence excluded in *Illinois Steel Company* v. *The Industrial Commission*,[102] which held that the finding of a probate court that a woman was the widow of a man killed in an industrial accident was not admissible to prove the marriage in an action by her against the employer to obtain compensation. Such an exception would not extend to pleadings in a separate suit, which must come in, if at all, under some other exception. In *Richardson* v. *State*,[103] a man prosecuted for killing his son-in-law as the latter was approaching his own wife and child, alleged that the homicide was in self-defense to prevent the victim from kidnapping the child, and was held entitled to introduce the victim's pleadings in his bill for divorce, charging the wife with adultery and unfitness to have custody of the child. If these pleadings showed that the defendant had a reasonable apprehension of an outrageous injury to his grandson, they might be admissible as verbal acts, but under the circumstances the opinion of the dissenting judges that the evidence was irrelevant and properly excluded at the trial seems sound.

Public documents. An encouraging tendency to regard records and reports made by a public official in the performance of his

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[100] Barnett *v.* Cohen, [1921] 2 K. B. 461; Calmenson *v.* Merchants' Warehousing Co., [1921] W. N. 59 (H. L. Ir.); Spiegel's House Furnishing Co. *v.* Industrial Commission, 288 Ill. 422, 123 N. E. 606 (1919), noted in 5 CORNELL L. Q. 182 and 6 A.L.R. 540, overruling Morris *v.* Industrial Board, 284 Ill. 67, 119 N. E. 944 (1918), noted in 32 HARV. L. REV. 83. See "The Functions of a Coroner's Jury," 84 JUST. P. 358 (1920); Horace Binney, "The Jurisdiction of Coroners in Pennsylvania," in VEEDER, LEGAL MASTERPIECES, 451.

[101] Hamlet, Act V, Scene 1; for a vivid description of a coroner's inquest in fiction, see A. S. M. HUTCHINSON, IF WINTER COMES; see also WILFRED SCAWEN BLUNT, MY DIARIES, II. 208.

[102] 290 Ill. 594, 125 N. E. 252 (1919), noted in 33 HARV. L. REV. 850.

[103] 204 Ala. 124, 85 So. 789 (1920), three judges dissenting, adversely criticized in 21 COLUMBIA L. REV. 192.

work as sufficiently trustworthy for use in a court of justice is exemplified by a Texas case [104] admitting a census report to prove that a boy had reached the age of criminal responsibility, and a thoughtful Utah opinion [105] admitting a physician's certificate to prove the cause of a death, in reliance upon "Wigmore's unexcelled work." Missouri, however, excluded a fire captain's report of an injury to one of his men, because he was ordered to keep a record of accidents by his chief and not by any ordinance or statute.[106] Public duty ought to be enough, whether imposed by executive order or a legislative rule, or even if the official decides to keep the record himself because he favors systematic business methods. In many instances, the hearsay exception of regular entries should reinforce the public document exception.

Income tax returns present a similar problem. Although they are not strictly public documents, since the writer is not an official, the same guarantees of trustworthiness exist, since they are required by statute, and accuracy is enforced by heavy penalties. The only sound objection to their admission is the statutory requirement of secrecy, which prevents any one but the taxpayer from using them in a private litigation. It is perhaps unfair to let him introduce the return when it helps him, since his adversary can not use it against him. A Kentucky accident case [107] did not allow the plaintiff to bring in the return to prove earning power, calling it a self-serving declaration. On the contrary, it might have been termed a declaration against interest, since the taxpayer would not report a dollar more of income than he could help.

Entries in course of business; account-books.[108] Judge Cardozo

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[104] Jefferson *v.* State, 85 Tex. Crim. App. 614, 214 S. W. 981 (1919), adversely criticized in 33 HARV. L. REV. 865.

[105] Bozicevich *v.* Kenilworth, 199 Pac. 406 (Utah, 1921), two judges dissenting. The evidence might also have come in as past recollection recorded. *Cf.* Williams *v.* Metropolitan Life Ins. Co., 108 S. E. 110 (S. C., 1921), excluding the certificate as to matters outside the physician's knowledge.

[106] Gass *v.* United Rys., 232 S. W. 160 (Mo. App., 1921).

[107] Veach's Adm. *v.* Louisville & I. Ry. Co., 190 Ky. 678, 228 S. W. 35 (1921), noted in 30 YALE L. J. 854, which points out that the income from a business would be relevant only if the portion derived from invested capital and good-will were segregated from the actual reward for personal services.

[108] On account books of parties, see Mansfield *v.* Gushee, 114 Atl. 296 (Me., 1921); "Death of adverse party as affecting evidence with respect to book account," 6 A. L. R. 756, note.

has lately emphasized the need in all states of a rule that entries in books of account should be admissible as *prima facie* evidence upon proof that they were made in the usual course of business, thus dispensing with the expensive formality of requiring the particular clerk who made each entry to testify.[109] Fortunately, many states are working in this direction, by decision or statute. A recent California case [110] did not even require a book, but admitted detached time-cards made out by workmen in an automobile repair-shop, when the signatures were identified by the bookkeeper who was accustomed to receive the cards for posting in the ledger. A narrower view was taken by a Pennsylvania decision,[111] excluding a single card from a physician's card system, which constituted his only account books, when this was offered to prove the number of visits to the patient named on the card. The English courts also take a narrow view of this hearsay exception, refusing to regard regularity of entry as a sufficient gaurantee of trustworthiness, unless there is also a duty owed to somebody to keep the books. Consequently, entries made by a doctor in his case book were not admitted after the doctor's death to show the nature of a patient's disease, although if the doctor had been practicing in partnership the judge intimated that they would have come in because then he would write under a duty to his partner.[112] This case proves that our technical attitude toward rules of Evidence has not wholly disappeared in the English courts.

Physical or mental condition, and intention. This is the most interesting exception to the hearsay rule, because of the fascinating difficulties of analysis. Four problems may be distinguished:

(1) A person's declarations are usually admissible to show his present state of mind, when mental state is in issue. Sometimes these are not hearsay at all but verbal acts, *e. g.*, a man's utterances are material to prove his sanity regardless of their truth or

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[109] Benjamin N. Cardozo, "A Ministry of Justice," 35 HARV. L. REV. 113, 121 (1921). Examples of the existing burdensome insistence on the entrant's testimony are Forrester *v.* Locke, 231 S. W. 897 (Ark., 1921); Loveman *v.* McQueen, 203 Ala. 280, 82 So. 530 (1919), reluctant opinion, noted in 52 CHIC. L. N. 220.

[110] Patrick *v.* Tetzlaff, 31 Cal. App. Dec. 559, 189 Pac. 115 (1920), noted in 8 CAL. L. REV. 440.

[111] Daniel's Est., 77 LEG. INT. 134 (1919), disapproved by 33 HARV. L. REV. 982, and 68 U. PA. L. REV. 397.

[112] Mills *v.* Mills, 36 T. L. R. 772 (P., 1920).

falsity.[113] Generally, however, the speaker's veracity is an element in the value of the declarations. Statements of existing pain, for example, are worthless if the speaker lies, and the frequency of such imposture has led some courts to show great suspicion toward this evidence.[114] In the absence of such special considerations of policy, the hearsay comes in.

(2) When mental condition is in issue, it may also be proved by a former or subsequent statement of the speaker's thoughts at the time of the statement. Thus letters written from three to five years after an alleged deed of gift were admitted to show that no delivery had been intended.[115] The stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current. But there is a point beyond which such evidence becomes irrelevant. Hudson River water at West Twenty-third St. Ferry is no proof of its quality above Fort Edward. Yet the abusive language of a former German under the stress of war in 1916 and 1917 was held to show fraudulent intent at the time of his naturalization in 1904, over sixteen years before.[116]

(3) In the preceding situations, present intent comes in to prove past or future *intent.* The *Hillmon* case [117] goes one step further and admits present intent to prove the happening of a future *act.* Some jurisdictions, notably Illinois,[118] have refused to adopt the *Hillmon* extension of the mental condition exception, and where an external fact is in issue do not admit declarations of intention, unless they fall under the *res gesta* exception, because they accompanied some act. In a murder trial the decedent's declaration of

[113] "Evidence of declarations of accused on issue of insanity," 8 A. L. R. 1219, note. Uncommunicated threat of victim of homicide, Mott *v.* State, 123 Miss. 729, 86 So. 514 (1920), noted in 34 HARV. L. REV. 675.

[114] Statements of physical condition not made to physician, admitted, Williams *v.* Bus Co., 32 Cal. App. Dec. 280, 190 Pac. 1036 (1920), noted in 34 HARV. L. REV. 88. Distinguish declarations of past condition, which fall in class (4) and are inadmissible: People *v.* Bray, 29 Cal. App. Dec. 428, 183 Pac. 712 (1919), noted in 5 CORNELL L. Q. 333; Magill *v.* Boatmen's Bank, 232 S. W. 448 (Mo., 1921).

[115] Coles *v.* Belford, 232 S. W. 728 (Mo., 1921).

[116] Schurmann *v.* United States, 264 Fed. 917 (C. C. A., 9th Circ., 1920), disapproved in 20 COLUMBIA L. REV. 800. *Accord,* United States *v.* Herberger, 272 Fed. 278 (W. D. Wash., 1921).

[117] Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285 (1892).

[118] Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (1904); see W. G. Hale, "The Hearsay Rule and its Exceptions," 2 ILL. L. B. 65, 66, 94 (1919).

intention to commit suicide was admitted because it accompanied the act of keeping whisky and poison in her room.[119] The Pennsylvania Supreme Court has recently followed the Illinois reasoning in *Commonwealth* v. *Palma*.[120] In a prosecution for murder, the state to rebut an alibi offered evidence that the deceased on leaving home an hour before he was killed told his wife that he intended to meet the defendant. This would have come in easily under the *Hillmon* doctrine, but Pennsylvania admitted it "as part of the *res gestæ*," to explain the husband's ambiguous act of departure. In short, if he had spoken the words to his wife twenty minutes before going out, they would have been just as probative of the identity of the man who was with him at his death, but would have been excluded by the Illinois-Pennsylvania test because they accompanied no act. Would they have come in if he had spoken them in the act of hunting for his overcoat? That has about as much or as little bearing on the identity of the murderer as the act of leaving the house. Under the true *res gesta* exception, the transaction which drags in its constituent declarations ought to be a material event in the case. The admissibility of a declaration of intention should not turn on the mere accident that it accompanies any act, however insignificant.

(4) Can present mental state come in as evidence of a *past* fact? If the *Hillmon* case, as proof that A went to Boston, admits his words "I am going to Boston," because his intention was probably carried out, why exclude his subsequent words, "I have been to Boston," inasmuch as he would not remember it unless he really had been? The objection that he may be lying applies equally well to his announcement of his intention. Indeed, even an honest statement of intention may not be carried out, and so is weaker evidence of the act intended than an honest memory would be. Eustace Seligman[121] thinks the two classes of evidence are indistinguishable, and should both be excluded. Wigmore would admit both, regarding the subsequent consciousness as an indication that the fact took place.[122] The trouble is, that this gets much hearsay in by the back door. On the other hand, it is difficult to defend the

[119] Nordgren *v.* People, *supra*.

[120] 268 Pa. 434, 112 Atl. 26 (1920), noted in 69 U. PA. L. REV. 384.

[121] "An Exception to the Hearsay Rule," 26 HARV. L. REV. 146 (1912).

[122] 3 EVIDENCE, § 1736.

Hillmon case against Seligman's argument. The best reply is, that declarations of memory of a past fact are usually cast in testimonial form, just as if the declarant were testifying to the fact on the witness stand, and so would be very liable to be treated by the jury like real testimony, whereas declarations of intention differ in form from a witness's narration, and consequently will not be confused with testimony, but will receive a slighter weight, especially as the jury, being practical men, know the possibilities of non-fulfillment of intentions. The House of Lords in 1914 went very far in Wigmore's direction, admitting a workman's statements that he intended to marry a girl because her expected child was his, not to prove the fact of marriage — that would be the *Hillmon* case — but to entitle her illegitmate child to compensation, as a dependent, for his death while still unmarried.[123] This has been recently followed in the Chancery Division by *In re Wright*.[124] An exercise of a power of appointment was alleged to be a fraud on the power, and a letter was offered in which the appointor stated that she had made a bargain to appoint to a certain person in return for an annuity from him, and would carry out her bargain. This was admitted, not to prove the past fact, but to show her improper motive. Inasmuch as her motive was not improper unless the bargain was made, it comes to much the same thing.

Another example of the "past act" problem is *Gilmore* v. *Gilmore* in South Dakota.[125] A woman sued her husband's parents for alienating his affections by false charges against her chastity. Her proof that they had made such charges consisted largely of her testimony as to declarations by her husband that he had left her because his parents told him he was not the father of her child. The majority of the judges held that, although his declarations would have been proper to show what he believed about her, they were inadmissible to prove the facts causing that mental condition, *viz.*, that his parents were the source of his information. The minority applied the *res gesta* exception, regarding the words as contemporaneous with the material fact of his diminishing affection.

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[123] Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733. See the adverse criticism in 28 HARV. L. REV. 299.

[124] [1920] 1 Ch. 108, P. O. Lawrence, J.

[125] 173 N. W. 865 (S. D., 1919), two judges dissenting, noted in 33 HARV. L. REV. 315, and 68 U. PA. L. REV. 187.

The declarations of a testator about his will are sometimes admitted under the mental state exception, although some writers[126] advocate an independent exception under which all ante-testamentary and post-testamentary declarations would come in regardless of the obstacles to non-testamentary declarations in such situations as the *Palma*[127] and *Gilmore*[128] cases. Whatever the theory, testamentary hearsay is viewed with increasing indulgence, whether to prove that a missing will was not destroyed with an intention to revoke and is therefore entitled to probate,[129] or to corroborate other evidence that an unproduced will was executed,[130] or that the signature to a disputed will is genuine.[131]

Declarations a part of a transaction; res gestæ.[132] There are two theories on the admissibility of various declarations which are alleged to be part of the *res gestæ*, or as James Bradley Thayer preferred to say, *res gesta* (transaction). Thayer's view[133] is that the declarations must be substantially contemporaneous with the action of a material transaction, and must explain the acts. He bases their admission on the need of telling a complete story of the event. Wigmore's view[134] goes farther and does not require contemporaneousness with an event. He favors the admission of statements or exclamations by an injured person, or by any other person present at any exciting occasion, immediately after the event, describing the circumstances as observed by him. In the cases the word "immediately" undergoes a considerable stretching. The confusion in the decisions is illustrated by the position

[126] *E. g.* the note by Alfred L. Finkelstein, 6 CORNELL L. Q. 201 (1921).

[127] Note 120, *supra*.

[128] Note 125, *supra*.

[129] *In re* Sweetman's Estate, 195 Pac. 918 (Cal., 1921), three judges dissenting, disapproved in 35 HARV. L. REV. 95; Holler *v.* Holler, 298 Ill. 418, 131 N. E. 663 (1921), *semble*, approved by Wigmore in 16 ILL. L. REV. 244.

[130] State *v.* Nieuwenhuis, 178 N. W. 976 (S. D., 1920), two judges dissenting, noted in 6 CORNELL L. Q. 201.

[131] *In re* Johnson's Est., 175 N. W. 917 (Wis., 1920), noted in 29 YALE L. J. 681.

[132] See also the preceding exception; note 68, *supra*, under Admissions; complaint of assaulted woman in civil action, 6 A. L. R. 1029; Scotch law of *res gesta*, Gilmour *v.* Hansen, 57 Sc. L. R. 518 (1920); statements of third persons admitted, Birmingham Macaroni Co. *v.* Tadrick, 88 So. 858 (Ala., 1921).

[133] "Bedingfield's Case — Declarations as Part of the Res Gesta," J. B. THAYER, LEGAL ESSAYS, 207; S. C., 14 AM. L. REV. 817; 15 *ibid.*, 1, 71 (1880, 1881).

[134] 3 TREATISE ON EVIDENCE, § 1745 ff., "Spontaneous Exclamations (Res Gestæ)."

of the United States Supreme Court, which supported Wigmore's view in *Insurance Company* v. *Moseley*,[135] and Thayer's view in *Vicksburg, etc. R. R.* v. *O'Brien*.[136] Recent discussion in the cases and law reviews inclines toward Wigmore's view. In *Washington-Virginia Railway Company* v. *Deahl* [137] the declarations of a motorman as he stepped from the trolley car after a collision with a truck that he had tried to hit the truck were probably admissible even on Thayer's view, and the *Vicksburg* case is cited; but in *Solice* v. *State* [138] the victim of a homicide walked a quarter of a mile before he described the affray. His statements, though conceded not to be contemporaneous, were admitted on the ground of spontaneity. Wigmore is cited, and the dissenting opinion in the *Vicksburg* case erroneously called the opinion of the court. On either view, the declarations are excluded if the event has terminated and the nervous excitement has been succeeded by reflective powers.[139] The whole subject is clarified by an article just published by Edmund M. Morgan, "A Suggested Classification of Utterances Admissible as Res Gestæ." [140]

Opinion [141]

The subject matter of expert testimony has already been touched on in the first installment of this article.[142] New types of experts, such as chiropractors,[143] are making their appearance, and new

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[135] 8 Wall. (U. S.) 397 (1869), two judges dissenting.

[136] 119 U. S. 99 (1886), four judges dissenting.

[137] 126 Va. 141, 100 S. E. 840 (1919), approved (with incorrect citation) on Wigmore's theory in 7 VA. L. REV. 666.

[138] 21 Ariz. 592, 193 Pac. 19 (1920), approved on Wigmore's theory in 19 MICH. L. REV. 442.

[139] Mayeur *v.* J. R. Crowe Coal & Mining Co., 106 Kan. 123, 186 Pac. 1035 (1920); Seebold *v.* State, 232 S. W. 328 (Tex. Crim. App., 1921).

[140] 31 YALE L. J. 229 (1922).

[141] See also "Fact and Opinion in an Action of Tort for Deceit," 1 BOSTON UNIV. L. REV. 117 (1921); "Development of the Opinion Rule in Iowa Cases," 6 IOWA L. B. 168 (1921); Wigmore, "Expert Opinion as to Cause of a Physical Ailment," 14 ILL. L. REV. 519 (1920); expert opinion based on all the evidence, 6 CORNELL L. Q. 428 (1921); value experts in Roman law, Nathan Matthews, "The Valuation of Property in the Roman Law," 34 HARV. L. REV. 229, 256 (1921).

[142] 35 HARV. L. REV. 307 (1922).

[143] Voight *v.* Industrial Commission, 297 Ill. 109, 130 N. E. 470 (1921), approved in 5 MINN. L. REV. 556.

ideas like dual personality intrude into the old field of handwriting,[144] though unfortunately the archaic prejudice against scientific investigation of disputed signatures by comparison of hands still prevails in some jurisdictions.[145]

A new kind of opinion evidence was offered by the defense in a recent California murder trial.[146] Skilled motion-picture actors performed the entire homicide, according to a description based on the testimony of witnesses for the defense. The trial judge refused to allow the film to be run off before the jury, even though an eyewitness would testify that it accurately depicted the events as he saw them. This has led Wigmore [147] to compile an additional section for his treatise dealing with artificial reconstruction of a complex series of movements by moving pictures. Of course, an actual moving picture of an event would be evidence as much as a "still" photograph.

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(To be concluded.)

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[144] Webster A. Melcher, "Dual Personality in Handwriting," 11 J. CRIM. L. & CRIM. 290 (1920).

[145] Texas Bank *v.* Scott, 225 S. W. 571 (Tex. Civ. App., 1920), disapproved in 34 HARV. L. REV. 788, 30 YALE L. J. 324. The sensible view, under statute, is shown in State *v.* Smith, 180 N. W. 4 (Ia., 1920), noted in 6 IOWA L. B. 185. See also "Knowledge derived from family correspondence as qualifying one to testify as to genuineness of handwriting," 7 A. L. R. 261, note; "Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting," 9 A. L. R. 984, note; Gordon L. Elliott, "Instruction to the Jury Where Handwriting is Identified by Expert Testimony," 7 IOWA L. B. 55 (1921).

[146] 23 LAW NOTES (N. Y.) 203 (1920); *cf.* Feeney *v.* Young, 191 App. Div. 501, 181 N. Y. Supp. 481 (1920), to be discussed in the next installment of this article; Daily *v.* Superior Court, 112 Cal. 94, 44 Pac. 458 (1896); People *v.* Durrant, 116 Cal. 179, 223, 48 Pac. 75 (1897).

[147] 15 ILL. L. REV. (1920); see 24 LAW NOTES (N. Y.) 143 (1920).